Supreme Court, U.S.
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92-228

No. 228

In The

Supreme Court of the United States

October Term, 1992

OTHELLO ARMSTRONG, et al.

Petitioners,

vs.

OWENS-ILLINOIS, INC.,

Respondent.

Petition for Writ of Certiorari
to the Court of Appeals of Maryland

REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

In conformity with Rule 29.1. of this Court, Respondent lists the following related companies and subsidiaries.

Owens-Brockway Packaging Inc.
OI Puerto Rico STS Inc.
Owens-Illinois de Puerto Rico
OI Venezuela STS Inc.
OI Peldar STS Inc.
OI Ecuador STS Inc.
OIB Produvisa Inc.
OI Consol STS Inc.
Overseas Finance Company
SeaGate, Inc.
OI Ione STS Inc.
OCG, Inc.
OI Closure FTS Inc.
OI US Capital STS Inc.
U.S. Cap & Closure, Inc.
Owens-Illinois Closure, Inc.
OI Plastic Products FTS, Inc.
Owens-Illinois Plastic Products Inc.
Owens-Illinois Prescription Products Inc.
OI Treitler STS Inc.
Owens-Illinois Labels, Inc.
Treitler-Owens, Inc.
OI Dougherty STS Inc.
DBC, Inc.
Owens-Illinois Specialty Products Puerto Rico, Inc.
OI Libbey FTS Inc.
Libbey Glass Inc.
OI Kimbla FTS Inc.
OI Kontes STS Inc.
Kontes Glass Company
OI Schott STS Inc.
OI Enbosa STS Inc.
Kimble Glass Inc.

OI General FTS Inc.
Owens-Illinois General Inc.
Harbor Capital Advisors, Inc.
HCA Securities, Inc.
Harbor Transfer, Inc.
Owens Industries, Inc.
Owens Hotel Industry, Inc.
OI Holding Company, Inc.
Owens International, Inc.
O-I Services, Inc.
Owens-Incorporated
Pacific Coast Glass Co., Ltd.
OI Castalia STS Inc.
OI Levis Park STS Inc.
OI MVCURC STS Inc.
Maumee Valley Community Urban
Redevelopment Corporation
OI UMI STS Inc.
Universal Materials, Inc.
OI AID STS Inc.
OI Overseas Management Company Limited
Owens-Brockway Glass Container Inc.
O-I Brockway Plastics, Inc.
Brockway Research Inc.
Brockway Realty Inc.
O-I Health Care Holding Corp.
Owens Insurance, Ltd.
Cisper Industria e Comercio, S.A.
Companhia Industrial Sao Paulo e Rio
Sao Raimundo Administracao, Participacoes e
Representacoes, Limitada
Owens-Illinois Canada, Inc.
Cristaleria Peldar, S.A.
Andividrios, S.A.
Cristaleria del Ecuador, S.A.
Owens-Illinois Asia, Ltd.

United Glass Group Ltd.
United Glass, Limited
Fabrica de Vidrio Los Andes, C.A.
Manufacturera de Vidrios Planos, C.A.
Owens-Illinois de Venezuela, C.A.
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Owens-Illinois Foreign Sales Corp.

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In The

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OTHELLO ARMSTRONG, et al.

Petitioners,

vs.

OWENS-ILLINOIS, INC.,

Respondent.

Petition for Writ of Certiorari to the Court of Appeals of Maryland

REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On January 7, 1992, the Maryland Court of Appeals heard arguments on five cases in which verdicts for punitive damages had been returned against the Respondent, Owens-Illinois. These five cases had been tried in three different consolidated trials in the Circuit Court for Baltimore City, and the Petitioners were plaintiffs in one of those trials. *Owens-Illinois, Inc. v. Armstrong*, 326 Md. 107, 604 A.2d 47 (1992). The opinions in the other two groups of consolidated cases are reported as *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 601 A.2d. 633 (1992), and *Eagle-Picher Ind., Inc. v. Balbos*, 326 Md. 179, 604 A.2d 445 (1992). Counsel of Record for Petitioners, Harry Goldman, Jr., was also counsel for the *Balbos* plaintiffs. In each case the Court of Appeals accepted review on the suf-

ficiency of the evidence in support of the punitive award against Owens-Illinois.

Balbos was the first case briefed. On August 30, 1991, Owens-Illinois filed a responsive brief to the assertions in plaintiffs' brief that the intermediate appellate court had erroneously reversed the verdict for punitive damages. *See Eagle-Picher v. Balbos*, 84 Md. App. 10, 72-9, 578 A.2d 228, 258-62 (1990). Pages 4 through 22 of Owens-Illinois' brief were devoted to argument about the standard against which to measure the evidence in support of punitive damages. App. A. This included a footnote discussing the writ of certoriari in the *Zenobia* case requiring the parties in that case to brief the same question, references to the Maryland Rule of Civil Procedure governing the scope of appellate review, and decisions of the Court of Appeals generally concerning the breadth of issues covered by its writ of certiorari. *Id.*, n.1, p. A2. The argument included reference to the fact that the Maryland Court of Special Appeals had reached opposite results when reviewing identical evidence presented by Petitioners and the *Balbos* plaintiffs. *Id.*, p. A4-5. On September 30, 1991, the *Balbos* plaintiffs filed a reply brief, through Petitioners' Counsel of Record, which attached the writ of certiorari from *Zenobia*, and argued that the matters asserted by Owens-Illinois were not subject to review in *Balbos* and should not be considered. App. B.

Zenobia was the second appeal briefed. The important issues raised by the *Zenobia* writ elicited *amicus* briefs from Maryland personal injury asbestos plaintiffs represented by Peter G. Angelos; the Maryland Trial Lawyers' Association; the Maryland Association of Defense Trial Counsel; the Center for [asbestos] Claims Resolution; Owens-Corning Fiberglas Corporation; and, jointly from the Product Liability Advisory Council, the Motor Vehicle Manufacturers Association, the Chamber of Commerce of the United States, the National Association of Manufacturers, the Business Roundtable, and the Chemical Manufacturers Association.

In the instant cases Owens-Illinois filed its brief as appellant in the Court of Appeals on November 5, 1991. That brief noted the identity of issues and counsel in the *Armstrong* and *Balbos* cases, and declined to repeat the arguments about punitive damage standards which had been presented in Owens-Illinois' *Balbos* brief. App. C. The Petitioners filed a responsive brief on December 9, 1991, through their Counsel of Record, which did not object in any fashion to the scope of Owens-Illinois' argument or the manner in which it was made.

Upon remand of this case to the trial court, petitioners enforced their judgments for compensatory damages. App. D.

With the inclusion of the foregoing, Respondent accepts Petitioners' Statement of the Case, except to the extent that the Statement argues the scope of application of *Owens-Illinois v. Zenobia*, 326 Md. 107, 604 A.2d 47.

SUMMARY OF ARGUMENT

I. Petitioners were ordered by the Court of Appeals to file a supplemental brief addressed to punitive damages practice and procedure. Petitioners failed to assert any constitutional violation in applying new practice or procedure to their cases, and therefore failed to preserve the issue for review by this Court.

II. Upon remand for a new trial on punitive damages the petitioners executed upon the judgment for compensatory damages. Maryland practice provides that this enforcement of the judgment waives the right to claim other damages.

III. The alleged retroactive application of the common law, including remand for a new trial, is consistent with orthodox judicial practice. This Court has upheld the discretion of state courts to apply decisional law this way, provided the decision does not impose an insuperable procedural barrier.

IV. If due process in these circumstances requires notice to petitioners and an opportunity to be heard, the required notice

and opportunity were provided by the requirement of a supplemental brief.

V. Petitioners assertion that their evidence satisfies their burden of proof does not raise a substantial federal question.

REASONS FOR DENYING THE WRIT

I

PETITIONERS WAIVED THE DUE PROCESS ARGUMENT RAISED HERE BY FAILING TO PRESENT IT IN THE STATE COURT

A petition for certiorari from a state court decision must demonstrate the stage of the proceeding where the federal question presented for review was raised. Sup. Ct. R. 14.1(h).[1] Petitioners make no such showing. The issues presented have been waived below.

Upon order of the Court of Appeals, Petitioners filed a supplemental brief advocating punitive damages standards. At that point Petitioners surely were on notice that the court might not apply the rule of law employed in proceedings below.[2]

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[1] If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph .1(k) of this Rule.

[2] Petitioners should have realized the pendency of this issue at the time the Court of Appeals accepted review of the sufficiency of the punitive damages evidence. Sufficiency of evidence necessarily requires considera-

Petitioners made no argument about needing more opportunity to state their views than was provided by the briefing order. The only issued raised of any moment to the Petition filed here was the argument that any change in the law should not apply to these cases because Respondent did not object to the jury instruction given, nor "raise the issue on appeal." App. E.

II

PETITIONERS ARE BARRED BY MARYLAND LAW FROM PURSUING PUNITIVE DAMAGES AFTER OBTAINING SATISFACTION OF THEIR COMPENSATORY DAMAGE CLAIMS

In this case, Petitioners have accepted payment in full for their award of compensatory damages. App. D. They continue to appeal the punitive damage determination in this case, despite Maryland law which bars such an appeal, as well as the enforcement of any finding made in such an appeal. *Kneas v. Hecht Co.*, 257 Md. 121, 262 A.2d 518 (1970) (acceptance of compensatory payment waives right to appeal JNOV as to punitive damages); *Turner v. Washington Sanitary Comm.*, 221 Md. 494, 505, 158 A.2d 125, 131 (1960) (appellate rights as to punitive damages waived where remittitur accepted).

The petitioners cannot pick and choose when and on which parts of a judgment they will collect. Maryland Rule 2-626[3] accords a defendant the right to an order of satisfaction

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tion of the the burden of proof. The burden of proof thus fell within the scope of review accepted. *See Crown Oil v. Glen*, 320 Md. 546, 560-61, 578 A.2d 1184, 1190-91 (1990). The dissenting and concurring opinions in two preceding punitive damages decisions by the Court of Appeals certainly provided every reason to believe the Court was dissatisfied with punitive damages practice in Maryland. *Schaeffer v. Miller*, 322 Md. 297, 587 A.2d 491 (1991); *St. Luke Church v. Smith*, 318 Md. 337, 568 A.2d 35 (1990).

[3] **(a) Entry Upon Notice.** - Upon being paid all amounts due on a money judgment, the judgment creditor shall furnish to the judgment debtor and file with the clerk a written statement that the judgment has been

where money to satisfy a claim has been collected, and no provision for "partial satisfactions." Therefore, the writ of certiorari should be denied in this case because a remand from this Court cannot result in the entry of an enforceable judgment in favor of Peitioners.

III

APPLICATION OF THE *ZENOBIA* RULING TO THESE CASES DOES NOT DENY DUE PROCESS OF LAW

Zenobia's pronouncements on Maryland civil punishment have several aspects. The Court of Appeals overruled a line of decision controlling punitive damages in tort cases "arising out of a contract." *Zenobia*, 325 Md. at 453-55, 601 A.2d at 649-50. The Court also overruled a 1972 decision that torts arising out of motor vehicle accidents permit punishment for "gross negligence," defined as wanton or reckless disregard for human life." 325 Md. at 456-60, 601 A.2d at 650-52. Furthermore, the Court instituted a clear and convincing burden of proof in support of a punitive award. 325 Md. at 465-69, 601 A.2d at 655-57. Finally, the Court turned to the retroactivity accorded to these several changes. 325 Md. at 469-73, 601 A.2d at 657-58.

The overruling of the contract/tort decisions and the punishable driving decision was accorded full retroactive effect, though usual rules of waiver and issue preservation apply to cases commenced before the date of the opinion. 325 Md. at 470-72, 601 A.2d at 658. The Court further noted that it was overruling no precedent about punishment in product liability

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satisfied. Upon the filing of the statement the clerk shall enter the judgment satisfied.

(b) Entry Upon Motion. - If the judgment creditor fails to comply with section (a) of this Rule, the judgment debtor may file a motion for an order declaring that the judgment has been satisfied....

cases, because no precedent existed. 325 Md. at 471, 601 A.2d at 658. The consolidated *Zenobia* cases were remanded for a new trial where plaintiff had the newly articulated burden of proving "a bad faith decision by the defendant to market a product, knowing of the defect and danger, in conscious or deliberate disregard of the threat to the safety of the consumer." 325 Md. at 463, 472-73, 601 A.2d at 659.

The Court instituted a somewhat different ruling regarding application of the clear and convincing evidence burden. This burden was applied to the appeals argued January 7, 1992, and to all trials in process at the date of the opinion. 325 Md. at 469-70, 601 A.2d at 657-58. Petitioners wrongly suggest that this retroactivity ruling is the only one, applying to all aspects of *Zenobia*'s civil punishment ruling.

These rulings by the Court of Appeals follow established procedures of the Court, as cited in the opinion. The rationale of applying these procedures to the case at hand was stated as well. Applying ordinary considerations controlling Maryland courts, the opinion determined that,

> Because the primary purpose of punitive damages is to deter defendants rather than to benefit plaintiffs, the purpose is served by applying today's decision retroactively. Furthermore, this is not a situation where there may have been reliance on the *Smith* case and the *Testerman-Wedeman* principle. A potential tort plaintiff does not in advance plan for or depend upon a particular punitive damages standard in a possible future tort case.

325 Md. at 471, 601 A.2d at 658. The last observation is particularly germane here because Owens-Illinois stopped making insulation containing asbestos in 1958, whereas the overruled decisions date from 1972 at the earliest. Petitioners did not tolerate exposure to Owens-Illinois Kaylo in the belief that *Smith*'s reckless disregard punishment standard would result in punitive damages in the event of an injury.

Application of *Zenobia*'s bad faith standard for punishment to Petitioners' cases implicates no due process concerns. The Court of Appeals conformed to its established authority and procedures in determining what the law is and to what cases it applies. 325 Md., at 469-70, 601 A.2d, at 657-58. Petitioners chose the forum of the Maryland courts, and have no ground to complain about application of customary Maryland practice.

Generally state courts have the authority to determine the retroactive application of state law decisions. *American Trucking Association, Inc. v. Smith*, 496 U.S. 167, 110 S.Ct. 2323, 2330, 110 L.Ed.2d 148 (1990). The ordinary course of common law development is full retroactive application to all parties whose claims have not been litigated to finality, excepting those who would unfairly lose the opportunity to obtain a remedy by a change in the law. *James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, ___, 111 S.Ct. 2439, 2443, 115 L.Ed.2d 481, 487-88 (1991). Justice Cardozo made clear the scope of any federal concern in the application of state common law changes in a prospective or retroactive fashion.

> We have no occasion to consider whether this division in time of the effects of a decision is a sound or an unsound application of the doctrine of stare decisis as known to the common law. Sound or unsound, there is involved in it no denial of a right protected by the Federal Constitution.
>
> ....
>
> A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward.... The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review, not the wisdom of their philosophies, but the legality of their acts.

Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364-65, 53 S.Ct. 145, 148-49, 77 L.Ed. 360, 366-67 (1932).

In the instant cases, the ordering of a new trial at which Petitioners will have a full opportunity to assert their claim calls into play this Court's determination that the charge made here is not a substantial federal question over which the Court has jurisdiction. *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 44 S.Ct. 197, 68 L.Ed. 382 (1924). This is not a circumstance where a retrospective determination creates an exclusive, but time-barred, procedure for asserting a claim. *See Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930); *cf.*, *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.E.2d 296 (1971). Petitioners have a full opportunity to push their punitive claim,[4] proved according to the standard that the Court of Appeals has found appropriate for punishment. The Court of Appeals determined in these cases that there should be no punishment elicited except on adequate proof of described misconduct. That determination raises no question of federally guaranteed rights at all.

IV

PETITIONERS HAD ANY CONSTITUTIONALLY REQUIRED NOTICE AND AN OPPORTUNITY TO BE HEARD ON THE NEW TRIAL RULING

Petitioners claim they were due notice that the Court of Appeals might apply a different rule of decision than was employed by the courts below, as guaranteed by the fourteenth amendment. The recognized authority of that Court to adjudicate the common law of Maryland,[5] however, is inconsistent

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[4] Provided they have not waived the opportunity by compelling payment of the compensatory damages.

[5] *See Owens-Illinois, Inc. v. Zenobia*, 325 Md. at 469-70, 601 A.2d at 657.

with the notion that notice must be given to all potentially affected litigants before the overruling of precedent can be undertaken. The argument is also inconsistent with the history of retroactive effect of changes in the common law. Retroactive application of state decisions to litigants who had no opportunity to speak to the appropriateness of the decision has been upheld by this Court. *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 61 S. Ct. 347, 85 L.Ed. 327 (1941). The absurd breadth of the argument is shown by considering that it would foreclose the strict liability theory Petitioners recovered upon here because Owens-Illinois last made the product at issue in 1958, while Maryland accepted the strict liability theory in 1976 without any notice to Owens-Illinois. *See Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976). Acceptance of Petitioners' argument would impose a restriction on the authority of state courts that the drafters of the fourteenth amendment are not shown to have contemplated.

Even assuming that the procedure employed here impacts in any way the due process clause of the fourteenth amendment, there was no violation. In the first instance, Petitioners had ample reason to believe that the Court would review the appropriateness of the standard employed below. *See* Respondent's Statement of the Case, and footnote 2, *supra*. Petitioners could have raised the appropriateness of

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[6] **(a) Generally.** The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

[7] **(a) Requirement.** - Every pleading and paper of a party represented by an attorney shall be signed by at least one attorney who has been admitted to practice law in this State and who complies with Rule 1-312....

Respondent's argument contained in briefs directed at this issue with a motion to strike, if they believed the issues raised there were beyond the Court's review. Maryland Rule 8-131(a);[6] Maryland Rule 1-311.[7] Finally, Petitioners submitted a supplemental brief at the Court's direction. Thus, they were heard.

Petitioners had been served with Respondent's arguments on punitive damages standards and burden of proof on August 30, 1991, in the *Balbos* brief, more than five months before Petitioners filed their supplemental brief. Petitioners were at that point apprised of Owens-Illinois' position on the substantive issue, and were referred to authority in support of the Court of Appeals considering the issue as presented in Respondent's brief. Petitioners were on notice of Owens-Illinois' positions, the Court of Appeal's interest in punitive damages law, and the Court of Appeals authority to determine the common law of Maryland. A finding that the Court of Appeals lacks the authority to require a new trial in these circumstances would substantially impair that Court's (and many others') ability to adjudicate cases and controversies. *See Griffith v. Kennedy*, 479 U.S. 314, 329, 107 S.Ct. 708, 713, 93 L.Ed.2d 649, 662-63 (1987). Any novelty inhering in Petitioners' arguments results from a failure to understand the common law authority of appellate courts.

(b) Effect of Signature. - The signature of an attorney on a pleading or paper constitutes a certification that the attorney has read the pleading or paper; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for improper purpose or delay.

(c) Sanctions. - If a pleading or paper is not signed as required (except the inadvertent omission to sign, if promptly corrected) or is signed with intent to defeat the purpose of this Rule, it may be stricken and the action may proceed as though the pleading had not been filed. For a wilful violation of this Rule, an attorney is subject to appropriate disciplinary action.

V

PETITIONERS' ASSERTION THAT THEY SATISFIED THEIR BURDEN OF PROOF DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION

Petitioners argue that their evidence satisfies all the requirements for a punitive award set out in *Zenobia*. This assertion fails to call upon a right or privilege established by federal law. This Court thus lacks jurisdiction over the issue. 28 U.S.C.A. §1257(a).[8]

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[8] (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

CONCLUSION

For each of these reasons this Court's writ of certiorari should not issue.

Respectfully submitted

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APPENDIX A

Excerpts from Reply Brief of Appellant/Cross-Appellee Owens-Illinois, Inc.

IN THE

Court of Appeals of Maryland

September Term, 1991
No. 22

EAGLE-PICHER INDUSTRIES, INC., et. al.,
Appellant,

v.

PAUL BALBOS, PERSONAL REPRESENTATIVE OF THE ESTATE OF LESLIE BALBOS, et al.
Appellee.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

REPLY BRIEF OF APPELLANT/CROSS-APPELLEE OWENS-ILLINOIS, INC.

ARGUMENT

I

THE COURT OF SPECIAL APPEALS CORRECTLY FOUND THAT PLAINTIFF'S EVIDENCE DID NOT SUPPORT AN AWARD OF PUNITIVE DAMAGES AGAINST OWENS-ILLINOIS

Plaintiff appeals the decision below that she failed to demonstrate through direct evidence that Owens-Illinois possessed substantial knowledge of the hazard that Kaylo insulation posed to the Decedent, and accordingly failed to prove a

gross indifference to that danger. *Balbos*, 84 Md. App. at 79. This case seems to present the first opportunity for this Court to address a punitive award in a product liability case. This appeal thus raises questions both about the dimensions of Plaintiff's burden of proof, and her fulfillment of that burden.

An appropriate standard for punitive damages in a product liability case presumably would derive from established grounds for punitive damages in similar torts. But the concurrence in a recent decision from this Court throws into question the requisites for a recovery of punitive damages in negligence cases. *Schaeffer v. Miller*, 322 Md. 297, 311-32 (1991) (Eldridge, J., concurring)[1]

A. JUDICIAL EXPERIENCE WITH PUNITIVE DAMAGES

Any consideration of punitive damages standards should take note of prior results which indicated pitfalls to avoid. By any reckoning, evil motive is the key element justifying an exemplary award. *See e.g. G.D. Searle & Co. v. superior Court*, 49 Cal. App. 3d 22, 30, 122 Cal Rptr. 218, 223 (1975). That court found that,

> The accretion of judicial definitions of malice has pushed to the fore a number of imprecise verbal

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[1] This Court has ordered Owens-Illinois to brief this opinion in an Order of July 26, 1991, in Owens-Illinois, Inc., et al. v. Zenobia, et al., Petition docket No. 140, September Term, 1991. Owens-Illinois did not request in the instant case a jury instruction on language that precisely tracked the standard advocated in the *Schaeffer* concurrence. Nonetheless, the question of a standard for a punitive recovery is inextricably entwined with the Court of Special Appeals' determination that the Plaintiff failed to produce evidence sufficient to satisfy the standard, and so the matters raised in the *Schaeffer* concurrence seem to be within the purview of the writ of certiorari in this case. *See Crown Oil v. Glen*, 320 Md. 546, 560-61 (1990). Alternatively, Owens-Illinois urges the Court to exercise the discretion vested by Md. Rule 8-131 (a) and address here questions raised in the *Schaeffer* concurrence as a timely matter of great public interest and concern. *See e.g., Squire v. State*, 280 Md. 132, 134-35 (1977).

> signals which - by color, nuance and suggestion - invite the jury to punish the Defendant for violating the jurors' standards rather than the law's.

49 Cal. App. 3d at 31-2, 122 Cal. Rptr. at 224.[2] A number of cases illustrate the risk of a verbal formula which essentially provides no constraint for jurors.

Two products cases decided in the Court of Special Appeals demonstrate the problem. In the first case, the jury imposed a $125,000 punitive award based upon what the Court described as only evidence of negligence and "inferences" of wanton and reckless disregard. *American Laundry Mach. v. Horan*, 45 Md. App. 97, 100, 117 (1980). The punitive judgment was reversed, but the dearth of supporting evidence did not dissuade the jury.

On another occasion the Court of Special Appeals had to reverse a $1.9 million punitive award because there was no evidence that the Defendant harbored an improper motive.

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[2] *See also* Henderson & Twerski, *Doctrinal Collapse in Product Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 290 (1990) ("if the rules and standards of decision are so ambiguous that, even upon review of the record by a judge they will support practically any jury outcome, then the system itself permits, even if it does not explicitly invite, jury lawlessness.") (footnote omitted).

Professor Ellis finds that,

> The law of punitive damages is characterized by a high degree of uncertainty that stems from the use of a multiplicity of vague, overlapping terms and the extraordinary deference accorded to juries who receive little meaningful guidance. As a result, the biases and inclinations toward wealth redistibrution exhibited by triers of fact are permitted to influence decisions on punitive damage issues. Accordingly, there is little reason to believe that only deserving defendants are punished, or that fair notice of punishable conduct is provided.

Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 52-3 (1982).

Harley-Davidson v. Wisniewski, 50 Md. App. 341, 339, 345-47 (1981), *cert. denied* 292 Md. 596 (1982). The evidence showed a manufacturing defect, with no evidence of the Defendant's awareness of the problem. *Id.* at 346.

The urge to punish in the absence of *any* evidence has been seen in other states as well. *See Acosta v. Honda Motor co., Ltd.*, 717 F.2d 828, 839-41 (3rd Cir. 1983) ($420,000 punitive award reversed); *Laney v. Coleman Co., Inc.* 758 F.2d 1299, 1305 (8th cir. 1985) ($3 million punitive award reversed); *Kicklighter v. Nails by Jannee, Inc.*, 616 F.2d 734, 738 (5th Cir. 1980)(punitive award 2.4 times greater than compensatories reversed); *Woelfel v. Firestone Tire & Rubber Co.*, 493 So.2d 472, (per curiam) Fl. App. 1986) ($6.5 million punitive award reversed); *Moore v. Remington Arms Co., Inc.*, 100 Ill. App. 3d 1102, 1115-16, 427 N.E.2d 608, 617-18 (1981) (punitive judgment over half as large as compensatory reversed); *Groppel Co., Inc. v. U.S. Gypsum Co.*, 616 S.W.2d 49, 62 (Mo. App. 1981) ($800,000 punitive award reversed); *Mosser v. Fruehauf Corp.*, No. 90-2394, slip op. at 11-19 (4th Cir. 1991) (affirming JNOV for Defendant on $5.5 million punitive award); *Roth v. Black & Decker*, 737 F.2d 779, 782 (8th Cir. 1984) ($35,000 punitive award reversed); *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 531 (Del. Supr. 1987) ($250,000 punitive award reversed); *see also*, *Kemner v. Monsanto*, 1991 Ill. App. LEXIS 1278 (App. Ct. Ill., 5th Dist. 1991) (reversing $16.5 million punitive judgment for failure of each of 65 plaintiffs to prove any compensatory damages. Plaintiffs also failed to prove the product at issue was defective). All but one of these corrections required appellate intervention. Obviously, further miscarriages can only be avoided by a plain standard which cannot be applied in an excessively limber fashion.

Another sign of flawed punitive damage standards is inconsistent results in the face of identical evidence. The instant appeal is one such case, given the court of Special Appeals affirmance of a punitive award against Owens-illinois in *Owens-Illinois, Inc. v. Armstrong*, 87 Md. App. 699 (1991).

In that case the parties agreed on appeal that the record in the two cases was indistinguishable, yet the Court below reached opposite results in deciding the two cases.

A second example arises in the Appellate Court of Illinois. *Cf. Loitz v. Remington Arms Co., Inc.*, 177 Ill. App. 3d 1034, 532 N.E.2d 1091 (1988), *rev'd* 138 Ill. 2d 404, 563 N.E. 2d 397 (1990), *and Moore v. Remington Arms Co.*, 100 Ill. App. 3d 1102, 427 N.E.2d 608 (1981). The earlier case, *Moore*, reversed a punitive award flowing from the explosion of the barrel of a Remington 1100 shotgun. In *Loitz* the Appellate Court later affirmed punitive damages of $1.6 million in addition to $75,000 compensatory damages, apparently on the ground that Remington "failed to warn" about a known defect. 177 Ill. App. 3d at 1057, 532 N.E.2d 1091, 1105-06. The *Loitz* Court recounted sales of over three million Model 1100 barrels over two decades, including use by the United States armed services after approval of the material, design, and manufacturing process. 177 Ill. App. at 1041, 532 N.E.2d at 1095. Every one of those barrels was tested according to a "universally recognized testing method". *Id.*

The evidence as recounted by the two opinions seems functionally indistinguishable. The Supreme Court of Illinois reversed *Loitz* on appeal, with three judges dissenting. 138 Ill. 2d 404, 563 N.E.2d 397. This history of inconsistent results and split decisions illustrates the frailty of punitive damage standards so ephemeral that appellate judges cannot agree on their meaning. *See also Hanover's Dairy, Inc. v. Mid-America Dairymen, Inc.*, 700 S.W.2d 426 (Mo. en banc 1985); *Lechtamer v. American Motors Corp.*, 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981).

Some of the facts in the present case illustrate the problem of formulating a punitive damage standard. After more than five years of study, Saranac Laboratory induced asbestosis in laboratory animals exposed to Kaylo dust. The consultant then advised that Owens-Illinois should treat the dust as a potentially

hazardous material. E. 6555. Plaintiff would infer from this that Owens-Illinois understood that Kaylo was in fact a hazard to persons in Mr. Knuckles' position. Upon this first inference Plaintiff would build a second, that Owens-Illinois did not reformulate the product or issue a warning because of a reckless indifference to Mr. Knuckles well being. Of course, it is just as plausible to infer in the first place that Owens-Illinois understood that Kaylo did not pose a substantial risk to Mr. Knuckles, regardless of the hazard confronted by rats in a dust chamber, and by extrapolation, possibly to humans in some other settings. The uncontradicted evidence supports the absence of a foreseen risk to Mr. Knuckles.

B. THE RELIABILITY OF EVIDENCE SUPPORTING PUNITIVE DAMAGES

One question in forming a punitive damage standard is whether the existence of any permissible inference, whether highly likely or highly unlikely, of actual or implied malice will create a jury question. A standard which allows any inference to go to jury would create a jury issue in all negligence cases. Roughly speaking, a negligence case is made by the occurrence of an avoidable injury which was foreseeably caused by the Defendant. If the Defendant had reason to foresee the problem, then it can always be inferred that she did foresee it. Having then inferred that foresight, it can further be inferred that the injury was caused either intentionally or by reckless disregard. *See Johnson v. Celotex*, 899 F.2d 1281 (2nd Cir.), *cert. denied*, 111 S.Ct. 297 (1990) (Punitive damages affirmed against Owens-Illinois and Celotex Corp. based on evidence of a "probable" link between asbestos and lung cancer at time of exposure, though unknown to Owens-Illinois, and evidence Owens-Illinois took precautions against asbestos exposure at its manufacturing facility. 899 F.2d at 1288. Judge Mahoney, dissenting, stated that punitive damages "are not properly chargeable against a Defendant who merely 'should have known' of the risk in question. It must be shown that the Defendant

was aware of the risk, and that he consciously disregarded it." *Id.* at 1291).

Obviously this Court and others have been unwilling to accept blindly all such permissible inferential chains. *See e.g. Thomas v. American Cytoscope Makers, Inc.*, 414 F.Supp. 255 (E.D.Pa.) ("the fact that the danger should have been foreseen does not mean, contrary to Plaintiff's assertion, that the risk was fully realized, or at least, realized to the extent necessary to show that degree of knowledge which when consciously disregarded deserves the approbation of 'recklessness.'") (JNOV) for Defendant of $200,000 punitive award.) The description and application of the limiting concepts has, however, elicited repeated observations of the difficulty of the task. *See Schaeffer v. Miller*, 322 Md. 297 (Eldridge, J., concurring); *St. Luke Church v. Smith*, 318 Md. 337, 364 (1990) (Rodowsky, J., dissenting) ("I agree that the law of punitive damages is 'broke' and needs 'fixing'"); *Smith v. Gray concrete Pipe Co.*, 267 Md. 149, 166 (1972) ("we perceive from some of the reported decisions the danger of formulating a test which may be so flexible that it can become virtually unlimited in application.")

C. ANALYSES OF PUNITIVE DAMAGES STANDARDS

The following consideration of a standard for punitive damages in products liability cases will consider three lines of analysis. Owens-Illinois concludes from this analysis that the only proper grounds for punishment in the product liability context are proof of intent to injure, or proof of intent to perpetrate a fraud about the safety of the product.

1. American Laundry Machine v. Horan

The instruction in this case largely tracks *American Laundry Machine v. Horan*, 45 Md. App. at 117.[3] Owens-Il-

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[3] The instruction in full read:

> Now, in order for there to be a right to punitive damages, in order for the plaintiffs to have the right to recover punitive damages, there must be conduct of an extraordinary and out-

linois did not object to this instruction, as it appeared to correctly state the controlling law. The *Horan* standard is workable if properly understood and applied, though it may be better to restate the language. In the *Horan* opinion Judge Wilner reviewed punitive damage decisions from this Court and then articulated a standard in the product liability context of, "direct evidence of substantial knowledge on the part of the manufacturer that the product is, or is likely to become, dangerous, and a gross indifference to the danger." 45 Md. App. at 117. While the direct requirement may be criticized as perhaps a technical misnomer,[4] it appears the Court was driving at the strength of the inferences necessary to support findings of substantial knowledge of a danger and gross indifference to the danger.[5]

2. Professor Owen's Analysis

The second line of analysis sheds light on the *Horan* standard. Professor David Owen is the leading scholar and commentator on punitive damages in product cases. He has expressed his thoughts principally in two articles: *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1 (1982) ("Owen (1982)"),

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> rageous nature. That is, there must be wanton and reckless conduct. Wanton and reckless conduct is more than mere negligence. Wanton and reckless conduct requires direct evidence of substantial knowledge on the part of the manufacturer that the product is or is likely to become dangerous and a gross indifference to that danger.

E. 4959 *See Eagle-Picher v. Balbos*, 84 Md. App. at 72-3.

[4] *See Henderson v. Maryland National Bank*, 278 Md. 514, 520-22 (1976); 1A Wignore, Evidence, §§24-26 (Tillers rev. 1983).

[5] "The only evidence offered in support of appellees' entitlement to punitive damages in this case was that which established appellant's negligence: failure to use the patented cut-off device and failure to warn of the danger involved in misloading absorbent and nonabsorbent materials. From this, appellees seek to infer the requisite wanton and reckless disregard in [*H&R Block v. Testerman*, 275 Md. 36, 43 (1975)]). It will not suffice, however." *American Laundry Machine v. Horan*, 45 Md. App. at 117.

and *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257 (1976) ("Owen (1976)"); *see also* Owen, *Crashworthiness Litigation and Punitive Damages*, 4 J. Prod. Liab. 221 (1981). The 1982 article specifically intended to revisit the concepts of the 1976 commentary in light of judicial developments, 49 U. Chi. L. Rev. at 2-6, and so this brief will focus on the later article.

Owen notes several complications in applying traditional punitive doctrine in products cases. These include the confusion and boredom which technical evidence confronts. Owen (1982) at 10. Owen also addresses the natural sympathy for an injured person, which often coalesces with general hostility to large institutions and big businesses. *Id.* at 11; *see also* Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 42 (1982). "Some jurors may thus be tempted to resort to simplistic explanations of the issue (such as that the Defendant callously 'traded lives for dollars') that comport with their preconceived notions of manufacturers' oppression of consumers." Owen (1982) at 11. Owen accepts these impediments to fair adjudication as perhaps levelling the strengths of the parties in litigating compensatory questions, and necessary to permit fair compensation. *Id.* at 11-2. On the other hand, the cases cited at pages 6 through 8 of this brief demonstrate the need for Owen's call for firm judicial control of punitive damages issues.

Beyond biases which may be harbored without perception, punishment of manufacturers has to account for the fact that design and marketing are intentional processes which routinely require the conscious trading off of conceivably desirable features in order to offer economically viable products which meet consumer expectations of desirability, value, and safety.[6] A

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[6] Owen explains:

> Virtually all important actions involve some risks to some people, and responsible individuals and institutions give careful consideration to such risks before they act. It is fundamen-

company which is vigilant concerning safety will engage in tests and review which may later provide the "smoking gun" when the product does not perform as expected. These problems are complicated where a complex product requires the involvement of numerous employees, possibly none of whom can understand every aspect of the design and safety considerations. Owen (1982) at 15-19, 26. "[T]he more a manufacturer is truly concerned about its product's safety, the more it will encourage self-criticism and 'negative' analysis of the product within the company." *Id.* at 17. Punitive standards must account for this problem, and not discourage safety investigations. *Id.* at 19. *See also* Ellis, *Fairness and Efficiency*, 56 S. Cal. L. Rev. at 57.

Given those considerations, Owen advocates for punitive liability upon a showing of "flagrant indifference to the public safety". Owen (1982) at 20-1. this means to Owen that a manufacturer can be "punished fairly only for *knowingly* leaving in its products dangers that are unreasonable". *Id.* at 24 (emphasis added). The word "flagrant" is intended to denote an extreme departure from accepted and socially acceptable safety practices and engineering choices. *Id.* Owen also offers five factors to provide necessary precision in applying the "flagrant disregard" standard.[7]

> tal to life in a dynamic world with an unpredictable future that one must proceed to act, notwithstanding the presence of some foreseeable risks, provided that the benefits of the contemplated action (or inaction) appear at the time to exceed the risks. If this basic tenet of risk-benefit analysis were not virtually the universal rule, life would grind nearly to a halt. Everyone employs this process hundreds of times each day, ticking off the balance of advantages versus disadvantages (which may affect other persons adversely) of one choice after another, often in only fractions of a second.

Owens (1982) (footnote omitted).

[7] The factors are:

(1) the existence and magnitude in the product of a danger to the public;

Owen concludes his review of the cases which shape his thinking by finding two categories where punishment is appropriate - fraud, and the choice of profit over safety in the face of a high risk of serious injury which the Defendant knew or should have known was easily avoidable by feasible and economical cures. Owen (1982) at 27. The analysis below shows that these two categories describe the same thing.

In spite of the dissimilarity of language, the *Horan* standard for punitive damages shares a philosophical affinity with the Owen's analysis. In fact, Professor Owen quotes approvingly *Horan's* operative language. Owen (1982) at 33, n. 151, *quoting* 45 Md. App. at 117. Because the *Horan* court studiously reviewed precedents from this Court, the preceding analyses cohere with the sentiments of the concurrence in *Schaeffer v. Miller.*

3. The Precedents In This Court

The *Schaeffer v. Miller* concurrence suggests a return to one of two precedents in negligence actions: *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149 (1972), or *Davis v. Gordon*, 183 Md. 129 (1944). The earlier case rejects implied malice as a ground for punitive damages in a negligence action while the later accepts that ground in auto torts.

Davis v. Gordon involved a car accident seemingly arising from negligence, although the Defendant's post-accident conduct evinced a substantial disregard for the well-being of the injured persons. This Court reversed the punitive award based on precedent requiring "fraud, or malice, or evil intent, or oppression entering into and forming part of the wrongful act".

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(2) the cost and feasibility of reducing the danger to an acceptable level;

(3) the manufacturer's awareness of the danger, of the magnitude of the danger, and of the availability of a feasible remedy;

(4) the nature and duration of, and the reasons for, the manufacturer's failure to act appropriately to discover or to reduce the danger; and

(5) the extent to which the manufacturer purposefully created the danger.

Owen (1976) at 1369, *quoted*, Owen (1982) at 27, n. 120.

183 Md. at 133. Malice was restricted to an intent to injure. *Id.* at 134. Rejecting the practice of other courts of routinely instructing a jury on punitive damages, this Court required proof of fraud, motive, or intent, which demonstrate actual malice *Id.*

Because the process of making and marketing products is necessarily deliberative, any punishment for the process should focus on the Defendant's deliberations. The *Davis v. Gordon* elements which correspond to a products case are intent to injure and fraud. Evil intent should not be part of the standard simply because its breadth is ill-defined, possibly expanding the intentional acts of fraud and causing harm malice beyond their desired parameters while shedding no additional light on those concepts. Oppression does not fit the product context, as it essentially applies to situations giving rise to a duty of good faith and fair dealing, like a fiduciary or commercial relationship. For instance, several cases discussed in the *Schaeffer v. Miller* concurrence might best be described as allowing punishment because of an intentional, oppressive abuse of a contractual relationship. *Henderson v. Md. National Bank*, 278 Md. 514 (1976); *McClung-Logan Equipment Co., Inc. v. Thomas*, 226 Md. 136 (1961).

Omitting "evil intent" and oppression from the *Davis v. Gordon* elements leave the actual intent to injury and fraud as grounds for punishment. Rarely if ever will a manufacturer intend to injure its customers, but this ground need not be excluded in determining a punitive damage standard. Fraud is the *Davis v. Gordon* element which best corresponds to the design and marketing processes when corrupted. Owen (1982), 49 U. Chi. L. Rev. at 27.

The elements of fraud are: (1) a false representation; (2) which the speaker either knows is false, or which is made with such reckless indifference to its truth that it equates with actual knowledge; (3) made for the purpose of deceiving the claimant; (4) which the claimant justifiably and detrimentally relied

upon; and (5) which caused actual damage. *See Everett v. Baltimore Gas & Elec.*, 307 Md. 286, 300 (1986). Proof of fraud requires clear and convincing evidence. *Id.*

The manufacturer of a product represents at least implicitly that it is safe and fit for ordinary use. Commercial Law Art. §2-314, Md. Code Ann. (1990); *See Frericks v. General Motors Corp.*, 274 Md. 288, 300-01 (1975); 1 Frumer and Friedman, Products Liability, §1.05 (rev. 1991).[8] A finding of negligence is a finding that the representation of fitness was foreseeably untrue. So the first element of fraud, a false representation, is a necessary element of a products liability recovery. The fourth and fifth elements of fraud are also part of all product liability recoveries, i.e., causation from the breach, and actual damages. It is the second and third elements of fraud, knowing deceit made for the purpose of deceit, which might turn a product case into one for punitive damages.

Several product liability cases illustrate the applicability of fraud to punishment in this context. Punishment in one Dalkon Shield case was explicitly grounded in fraud. *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 241 Kan. 441 (1987). The Ford Pinto presents another renowned case. *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981). Professor Owen criticizes the "conscious disregard" standard employed in the case because product design requires the conscious trade-off of desirable features. Owen (1982) at 21-22. Viewing the facts in view of fraud makes the result much clearer.

> Ford knew that the Pinto's fuel tank and rear structure would expose consumers to serious injury or death in a 20 to 30 mile-per-hour collision. There was

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[8] Owens-Illinois is not asserting that Plaintiff's failure to make out her warranty claim defeats her punitive claim. Defendant simply observes that the selling of products involves at least implicit representations, which indicates that fraud is a sound analytical basis within which to consider punishment for product liability.

> evidence that Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits.

119 Cal. App. 3d at 813, 174 Cal. Rptr. at 384. There was evidence Ford knew its implied representation of reasonable crashworthiness was untrue. There was evidence Ford intended this misrepresentation to deceive purchasers to buy a known unsafe car. While the evidence may be so strong here that the court's callous disregard standard presents little difficulty, the cases discussed above show that callousness and its synonyms engender a high rate or erroneous verdicts. Fraud shares the malice element intended by elusive adjectives such as "reckless" or "conscious", while offering meaningful requirements of the appropriate intent elements.

It might be objected that a requirement of an intent to deceive mandates proof of an intent to injure, but that need not be so. A manufacture motivated solely by profitability for use, or with a design known to pose an unreasonable and unnecessary risk of serious bodily harm, effectively intends to deceive its user about the safety for use without necessarily desiring to cause an injury.[9] *See Grimshaw v. Ford*, 119 Cal. App. 3d at 813, 174 Cal. Rptr. at 384.

This standard is also a consistent restatement of the Circuit Court's instruction in this case, derived from *Horan*. *Horan* requires "direct evidence of substantial knowledge on the part of the manufacturer that the product is, or is likely to become, dangerous, and a gross indifference to the danger." 45 Md.

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[9] In addition to fraud, Professor Owen perceives punitive damages as appropriate where "the manufacturer chose to profit from exposing consumers to a high risk of serious injury that it knew could easily be avoided through feasible and economical curative measures". Owen (1982), 49 U. Chi. L. Rev. at 27 (footnote omitted). These activities essentially describe a known deceitful representation made with an intent to deceive about the safety of the product.

App. at 117. Gross indifference is exhibited by the failure to adopt readily available correctiveness measures, and so this lapse in light of substantial knowledge of a serious hazard constitutes deception undertaken with the intent to deceive.

Fraud, then, constitutes a meaningful ground for recovery in a products liability case consistent with this Court's precedent, and consistent with the thorough and persuasive reviews of Professor Owen. Fraud has a prudential history which can be drawn upon by the courts, and defined elements which must be proven by clear and convincing evidence. Its existence does not depend on a proliferation of adjectives like "wanton," "reckless," "outrageous," "gross," "flagrant," and more, the meaning of which has been shown to disappear at times when turned over to the discretion of a jury. Fraud cannot be proved by heaping tenable but unlikely or unproven hypotheses one upon another.

This analysis of product punitive damages also plainly distinguishes the deliberative design and marketing processes from the context of auto torts, where this Court has applied an implied malice standard. *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149; *see also Nast v. Lockett*, 312 Md. 343 (1988). Driving and analogous activities involve a level of spontaneity which cannot be aptly compared with the lengthy process required to take a product from the drawing board to the retain outlet and post-marketing product development.[10] Having distinguished the type of torts exemplified by *Smith* and *Nast*[11] as inapposite to the instant facts, it is inappropriate to further conjecture on whether the punitive standard in those cases deserve refinement.

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[10] Owen (1982), 49 U. Chi. L. Rev. at 15-19; Henderson & Twerski, *Doctrinal Collapse in Products Liability: The Empty Shall of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 310 (1990.

[11] In both of these auto tort cases this Court drew on statutory provisions for criminal punishment of the type of tortious conduct alleged. *Nast*, 312 Md. at 352-55; *Smith*, 267 Md. at 167-68. Plaintiff has not alleged that Owens-Illinois violated either criminal laws or civil regulations intended for Mr. Knuckles' protection.

APPENDIX B

Excerpts from Reply Brief of Appellant Lucille Killian, Personal Representative of the estate of Sutton Knuckles, et al.

IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1991

NO. 22

LUCILLE KILLIAN, PERSONAL REPRESENTATIVE OF THE ESTATE OF SUTTON KNUCKLES, et al.

Appellees,

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

REPLY BRIEF OF APPELLANT LUCILLE KILLIAN, PERSONAL REPRESENTATIVE OF THE ESTATE OF SUTTON KNUCKLES. et al.

STATEMENT OF THE CASE

Appellant, Lucille Killian, Personal Representative of the Estate of Sutton Knuckles, hereby adopts and incorporates by reference the Statement of The Case contained in its Appellant's Brief submitted on July 22, 1991.

STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Special Appeals err in reversing Knuckles judgment for punitive damage?

2. Would the reinstatement of punitive damages violate Owens-Illinois' and Eagle-Picher's right to due process of law

by subjecting the Defendants to multiple punishments for the same alleged wrong?

3. Would the reinstatement of punitive damages violate Owens-Illinois' right to due process of law because the standards for calculating the sum of the award give no guidance regarding the appropriate amount of punishment?

STATEMENT OF FACTS

Appellant, Lucille Killian, Personal Representative of the Estate of Sutton Knuckles hereby adopts and incorporates by reference the statement of facts contained in its Appellant's brief submitted on July 22, 1991.

ARGUMENT

I. OWENS-ILLINOIS' ARGUMENT ON AN APPROPRIATE STANDARD FOR PUNITIVE DAMAGES IN THE CASE AT BAR EXCEEDS THIS COURT'S GRANT OF CERTIORARI.

Appellee Owens-Illinois (hereinafter O-I) argues that because of the history of inconsistent results in punitive damage awards This Court needs to correct an existing standard which is flawed. O-I suggests that a punitive damage standard similar to the standard set out in *Schaefer v. Miller* 332 Md. 297, 311-32 (1991) (Eldridge, J., concurring) should be applied to product liability cases. In essence, O-I contends that This Court should require proof of fraud, motive, or intent, which demonstrates actual malice when courts instruct juries on punitive damages. *Davis v. Gordon*, 183 Md. 129 (1944).

O-I, in arguing what the Maryland standard for punitive damages should be, has exceeded This Court's grant of certiorari. Appellee O-I contends that even though it did not request in the case at bar a jury instruction as stated above, matters raised in the *Schaefer* concurrence are within the purview of the writ of certiorari in this case. (Neither did O-I except to the Court's charge on this issue.) This is clearly not

the case if one looks at the Order of This Court (Rep. App. 103) granting certiorari on May 13, 1991 in the case at bar and This Court's order (Rep. App. 4-6) granting certiorari on July 26, 1991 in the asbestos case of *MCIC, Inc. v. Zenobia*, 86 Md. App. 456, 587 A.2d 531 (1991). In *Zenobia*, the order specifically instructs the parties to address the issue of what the correct standard should be under Maryland law for the allowance of punitive damages in negligence and product liability cases in light of *Smith v. Gray Concrete Pipe Co.*, 267 Md. 149 (1972), *Davis v. Gordon*, 183 Md. 129 (1944) and Judges Eldridge, Chasanow and Cole concurring opinion in *Schaefer v. Miller*, 332 Md. 297 (1991). However, This Court's Order in the case at bar is devoid of such an instruction. If This Court wanted the parties here to address a punitive damage standard in light of the concurring opinion of Judges Eldridge, Chasanow, Cole in *Schaefer*, it would have expressly stated such in its Order granting certiorari. It is noteworthy that *Schaefer* was decided prior to This Court's grant of certiorari in the present case, yet This Court did not see fit to have the parties address that issue in this case.

O-I admits that it did not preserve this issue for review when it failed to request a jury instruction on language advocated in the *Schaefer* concurrence.

Furthermore Maryland Rule 8-131 states:

> (a) "...Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court,..."
>
> (b) "Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals or by a circuit court acting in an appellate capacity, the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals..."

It is a well settled rule in Maryland that the appellate court does not decide questions which have not been raised and decided by the trial court. *Schiller v. Lefkowitz*, 242 Md. 461, *cert denied*, 385 U.S. 947 (1966); *Accord, Thomas v. Corso*, 265 Md. 84 (1972); *Young v. State* 220 Md. 95 (1959), *cert. denied*, 363 U.S. 853 (1960); *Martel v. State*, 221 Md. 294, *cert. denied*, 363 U.S. 849 (1960). Therefore because Appellees brief exceeds the grant of certiorari, Appellant respectfully requests that This court strike those portions of O-I's brief which discuss the punitive damage standard advanced in the *Schaefer* concurrence.

Assuming that O-I's brief does not exceed This court's grant of certiorari, its requested punitive damage standard in products liability cases conflicts with a number of courts. O-I concludes that proper grounds for punishment in product liability cases are proof of intent to injure, or proof of intent to perpetrate a fraud about the safety of the product. Basically, at the root of O-I's argument lies the proposition that in order to recover punitive damages in products liability actions the injured party must prove actual malice. However, Professor David Owen, a leading scholar and commentator on punitive damages in product liability cases states that "most courts, ...have eschewed the 'flagrant indifference' standard and have opted instead to apply the broader, more traditional liability standards, such as 'willful', 'wanton', 'malicious', 'conscious', or 'reckless' disregard of the rights of others.[1] Owens, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 21 (1982).

[1] *See Wolf v. Goodyear Tire & Rubber Co.*, 808 S.W. 2d 868, 872, 874 (Mo. Ct. App. 1991), *Moran v. G. W. H. Corson, Inc.*, 586, A.2d 416, 422, 423 (Pa. Super. 1991(, *Masaki v. General Motors Corp.*, 780 P.2d 566, 572 (Hawaii 1989), *Keller Industries, Inc. v. Waters*, 501 So.2d 125 (Fla. App. 1987), *Sliman v. Aluminum Co. of America*, 731 P.2d 1267, 1274 (Idaho 1986), *Chrysler Corp. v. Wolmer*, 499 So.2d 823, 824 (Fla. 1986), *Thiry v. Armstrong world Industries*, 661 P.2d 515, 518 (Okl. 1983), *Wanger v. Ford Motor Co.*, 294 N.W. 2d 437, 442 (Wis. 1980), *Gryc v. Dayton-Hudson*

(Indeed, even "flagrant indifference", is a more pro-victim standard than that advocated by O.I.) (This is the standard set forth in M.P.J.I. 10:6, p. 232 (1984). It is noteworthy that the M.P.J.I author, Digges was a products liability defense lawyer, yet conceded that implied malice was the Maryland standard for assessing punitive damages in product liability cases.

Corp., 297 N.W. 2d 727, 739 (Minn. 1980), *cert. denied*, *Riegel Textile Corp. v. Gryc*, 449 U.S. 921 (1980), *Dorsey v. Honda Motor Co.*, 655 F.2d 650, 658 (5th Cir. 1981), *reh'g denied & modified* 670 F.2d 21 (5th Cir. 1982), *reh'g denied* 673 F.2d 911 (5th Cir. 1982), *cert. denied* 459 U.S. 880 (1982), *Rinker v. Ford Motor Corp.* 567 S.W. 2d 655, 667 (Mo. Ct. App. 1078).

APPENDIX C

Excerpts from Brief of Petitioner Owens-Illinois, Inc.

IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1991

NO. 77

OWENS-ILLINOIS, INC.,

Petitioner,

v.

OTHELLO ARMSTRONG, et al.

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF PETITIONER

Owens-Illinois, Inc.

ARGUMENT

III

IN LIGHT OF THE COURT OF SPECIAL APPEALS' OPINION IN *EAGLE-PICHER IND., INC. V. BALBOS*, THE AWARDS OF PUNITIVE DAMAGES AGAINST OWENS-ILLINOIS, INC. IN THIS CASE SHOULD BE REVERSED.

The Court of Special Appeals correctly determined that the record on appeal in these cases was not different for the

purposes of punitive damages from the record before it in *Eagle-Picher Ind., Inc. v. Balbos*, 84 Md. App. 10 (1990); *Armstrong*, 87 Md. App. at 722-23. Nonetheless, the court reached an opposite conclusion here and affirmed the punitive damage judgment rather than reversing it as it did in *Balbos*. Given the identity of facts and issues, Owens-Illinois will not repeat here the arguments on punitive damages that it filed with the Court in *Balbos*, No. 22, September 1991, and which will be argued on the same day as this appeal. Rather than embark on this rote procedure, this Defendant will restrict its arguments here to the basis of the punitive damage decision in this case below.[1]

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[1] The same counsel appears for plaintiffs in *Balbos* and in this case, so they are familiar with Owens-Illinois' arguments in *Balbos*.

APPENDIX D

IN THE

Circuit Court For Baltimore City

OTHELLO ARMSTRONG, et al.

Plaintiffs,

v.

OWENS-ILLINOIS, INC.

Defendant.

Case Nos.: 88028502 and 87121049/CL65032

MAY, 1989 - GROUP III

ORDER

This Order concerns the motions of defendant Owens-Illinois, Inc., for injunctive relief. The Court has considered the motions and Plaintiffs' response. Oral argument was heard on June 12, 1992. In order to dispote of the motions, this ___ day of June, 1992, the following is ORDERED, ADJUDGED, AND DECREED.

(1) Each Plaintiff has an immediate right to collect on the compensatory awards in the respective cases.

(2) Each Plaintiff has elected to immediately collect on the compensatory awards in the respective cases.

(3) Owens-Illinois shall immediately pay the following sums:

Armstrong v. Owens-Illinois, Inc.

Compensatory awards	$486,666.67
Open court cost	$80.00
Interest through 6/15/92	$140,533.30
	$627,279.97

Plus an additional $133.3333 interest pay day to the date this Order is signed.

Wood v. Owens-Illinois, Inc.

Compensatory awards	$328,500.00
Open court costs	$70.00
Interest through 6/15/92	$94,860.00
	$423,430.00

Plus an additional $90.00 interest per day to the date this Order is signed.

(4) These obligations may be satisfied by payment from Owens-Illinois and/or drafts against the letters of credit securing the defendnat's liability in these cases. Plaintiffs shall immediately inform the defendant the source from which all money will be received.

(5) Upon payment of the amounts stated above, the compensatory damages judgments will be satisfied and these cases ended as to compensatory damages.

(6) Accordingly, all requested injunctive relief is DENIED.

CLIFTON GORDY
Judge
The Judges signature appears
on the original document

APPENDIX E

IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1991

NO. 77

OWENS-ILLINOIS, INC.,

Petitioner,

v.

OTHELLO ARMSTRONG, et al.

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

SUPPLEMENTAL BRIEF OF RESPONDENTS

OTHELLO ARMSTRONG, et al.

STATEMENT OF THE CASE

Following argument of these cases on January 7, 1992, the Court issued the following Order.

> The Court having considered the briefs and oral argument in the above captioned case, it is this 9th day of January, 1992.
>
> ORDERED, by the Court of Appeals of Maryland, that the parties file supplemental briefs and address in those briefs the following question:
>
> In light of the concurring opinion of Judges Eldridge, Chasanow, and Cole in *Schaefer v. Miller*,

322 Md. 297, 312, 587 A.2d 491 (1991), what should be the correct standard under Maryland law for the allowance of punitive damages in negligence and product liability cases, *i.e.*, gross negligence, actual malice, or some other standard. *See, e.g., Smith v. Gray Concrete Pipe Co.*, 267 Md. 149, 297 A.2d 721 (1972); *David v. Gordon*, 183 Md. 129, 36 A.2d 699 (1944).

and it is further

ORDERED that the Petitioner's supplemental brief shall be filed on or before January 27, 1992 and the Respondents' supplemental brief shall be filed on or before February 12, 1992.

INTRODUCTION

Petitioner Owens-Illinois, Inc., did not object to the trial court's instruction on the law of punitive damages and did not raise the issue on appeal. Thus, the issue addressed in the parties' Supplemental Briefs should have prospective application only.

STATEMENT OF QUESTION PRESENTED

WHAT SHOULD BE THE CORRECT STANDARD UNDER MARYLAND LAW FOR THE ALLOWANCE OF PUNITIVE DAMAGES IN NEGLIGENCE AND PRODUCT LIABILITY CASES?

ARGUMENT

Product liability actions may rest on a number of legal theories. Some theories are *ex contractu* in nature (such as breach of warranty), while others are *ex delicto* in character, such as traditional theories of negligence and fraud, and the more recent principle of strict liability. Whatever the theory plead and argued, the underlying contention in these cases is

that a defective product which was placed on the market caused injury.

The test for punitive damages set forth in Restatement (Second) of Torts Section 908, provides that

> "[p]unitive damages may be awarded, for conduct that is outrageous because of the defendant's evil motive or his reckless indifference to the rights of others."

This is essentially the standard described by the court in *Wedeman v. City Chevrolet Co.*, 278 Md. 524, 532, 366 A.2d 7 (1976), for tort cases generally.

> "Whether stated as 'wanton or reckless disregard for the rights of others,' or as 'reckless indifference to the rights of others,' it is 'we think' the correct standard to be applied in a product liability action."

American Laundry Machinery Industries v. Horan, 45 Md. App. 97, 412 A.2d 497, 418-419 (1980). Thus, in order to sustain an award of punitive damages in a product liability case based on negligence, it must be shown that:

> "First, the manufacturer must be either aware of or culpably indifferent to and unnecessary risks of injury. Second, knowing that its product is or might be excessively dangerous, the manufacturer must intransigently refuse either to determine the seriousness of the danger or to reduce it to an acceptable level." (such as by adding appropriate warnings labels to the product) [Parenthesis added]

Harley-Davidson Motor Company, Inc. v. Wisniewski, 50 Md. App. 339, 437 A.2d 700 (1981) *cert. denied*, 292 Md. 596 (1982), quoting from D.G. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L Rev. 1256, 1362 (1976).

This Court's decision in *Nast v. Lockett*, 312 Md. 343, 539 A.2d 1113 (1988), validates the decisions of the Court of

Special Appeals concerning punitive damages in product liability cases. Recognizing that the allowance of punitive damages rests in the sound discretion of the trier of fact, this court held that in order for punitive damages to be awarded, evidence must be sufficient to establish that the defendant was grossly negligent, that is, that he had a wanton or reckless disregard for human life. Reckless lack of concern for whether others might be killed or seriously injured, i.e., that the defendant had a wanton or reckless disregard for human life, is the legal equivalent of intending harm and punitive damages may be awarded. Only conduct that is of extraordinary or outrageous character will be sufficient to imply this state of mind and thus suffice as **implied malice** - the legal equivalent of actual malice. *Nast*, 539 A.2d at 1117.

Just as in *Nast*, the Court of Special Appeals in *Exxon Corp. v. Yarema*, 69 Md. App. 124, 516 A.2d 990 (1986), *cert. denied*, recognized that:

> "The award of punitive damages does not hinge on whether the tort feasor exhibited the requisite level of malice against a particular individual, but rather the defendant's breach of societal obligations is so egregious, that the imposition of monetary penalty beyond actual compensation is necessary to punish the wrongdoer in order to protect society through the deterrence effect of the penalty... 'Punitive damages are awarded... where a wrongful act is done with bad motive or so reckless to imply a disregard of social obligations or where there is such willful misconduct or entire want of care as to raise a presumption of conscious indifference to the consequences.' ... *See generally* 22 AM. Jur.2.d *Damages*, Section 250 (1964)."

Exxon Corp., 516 A.2d at 1013.

The issue of what standard should apply to the award of punitive damages in asbestos cases was addressed most recent-

ly by the Supreme Court of Virginia in *Owens-Corning Fiberglas Corporation v. Jacqueline R. Watson*, Record No. 910073, 8 VLR 1829 (1992). In Virginia, the legislature has codified the standard for punitive damages in Section 8.01-52 of the Civil Remedies and Procedure Article of the Annotated Code of Virginia. At Section 5, the statute provides:

> "5. Punitive damages may be recorded for willful or wanton conduct, or such recklessness as evinces conscious disregard for the safety of others."

Focusing on the same product as in the case at bar - Kaylo - and on some of the same conduct - the Virginia Supreme Court in *Watson* case upheld the jury's award of punitive damages against Owens-Corning Fiberglas (against whom the jury in the case at bar also found the evidence sufficient for an award of punitive damages), and in so doing, stated:

> "That negligence which is so willful or wanton as to evince a conscience disregard of the rights of others, as well as malicious conduct, will support an award of punitive damages... Willful and wanton negligence is defined as "acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another."

OCF v. Watson, 8 VLR. 1829, (Vg. 1992).

Wanton or reckless conduct requires far more than mere negligence or what may casually be inferred from negligence. In a products' liability case, reckless indifference to the rights of others may be found in a manufacturer's total failure to comply with the affirmative obligations and duties imposed by law not to endanger the health and safety of the users of their products. Alternatively, substantial knowledge on the part of the manufacturer that a product is, or is likely to become

dangerous, accompanied by a gross indifference to the danger may also be reason enough to award punitive damages.

For the reasons set forth below, an award of punitive damages **cannot** be conditioned on a showing of direct evidence of substantial knowledge on the part of the manufacturer that its product is dangerous. Thus, a "fraud" standard for punitive damages is in appropriate.

To require a showing of direct evidence of substantial knowledge on the part of the manufacturer as prerequisite to awarding punitive damages would encourage manufacturers not to test their products, and not to check the medical and scientific literature to determine the hazards or dangers associated with their products, all to avoid punitive damages. Such a requirement would promote a state of self-imposed total ignorance on the part of manufacturers who, by demonstrating an absence of "substantial knowledge that the product is, or is likely to become dangerous" could effectively avoid punitive damages. In other words, to condition punitive damages on evidence that the manufacturer actually had substantial knowledge that the product is, or is likely to become dangerous, encourages exactly that behavior which punitive damages are designed to deter — namely, reckless indifference by the manufacturer to the rights, safety and lies of others, all in the name of avoiding punitive damages.

The anomaly created by a standard which demands a showing of "direct evidence of substantial knowledge on the part of the manufacturer that the product is, or is likely to become dangerous," is easy to see. Manufacturers who marketed products without ever testing them, without ever checking the medical or scientific literature to determine the dangers associated with the products or their ingredients, and who never did anything at all to investigate the hazards of their products would always escape punitive damage liability by pointing out their total lack of knowledge (self-imposed as it may be) that the product is, or is likely to become dangerous.

Thus, wanton and reckless conduct must be viewed as highly unreasonable conduct which involves an extreme departure from ordinary care. Such wanton or reckless conduct, when in the form of self-imposed ignorance, certainly must be more than any mere mistake resulting from inexperience, or confusion and more than mere thoughtlessness or inadvertence, or simple inattention. *See*, Prosser & Keeton, *Law of Torts*, §34, pp. 212-14 (3d Ed. 1984). It must be such conduct as evinces a conscious disregard for the safety of others.

Finally, this Court has only limited control of the rule of law relating to punitive damages. In Maryland courts, defendant corporations domiciled in other States which adhere to a liberal standard for imposing punitives will still be subject to that standard, regardless of this Court's decision, under the decepage doctrine. See Restatement of the Conflict of Laws, Section 145; *Hunter v. Greene*, 734 F.2d 896 (2nd Cir. 1984); Reese Decepage, 73 Colum. L. Rev. 58 (1973) Five Federal Circuit Courts have upheld this doctrine.

CONCLUSION

For the reasons herein and for those previously stated, the punitive damages awards should be affirmed.